

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS  
BY A PERSON IN STATE CUSTODY**

<b>United States District Court</b>	<b>District: Eastern District of Pennsylvania</b>
<b>Name (under which you were convicted):</b> <u>John G. Berg</u>	<b>Docket or Case No.:</b> <u>2:19-CV-01275-RK</u> <u>CP-23-CR-0006201-2016</u>
<b>Place of Confinement:</b> <u>Delaware County Prison</u>	<b>Prisoner No.:</b> <u>N/A</u>
<b>Petitioner</b> (Include the name under which you were convicted): <u>John G. Berg</u>	<b>Respondent</b> (Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner): <u>Delaware County Probation Dept.</u>
V.	
and	
The District Attorney of the County of: <u>N/A</u>	
and	
The Attorney General of the State of: <u>N/A</u>	

**PETITION**

- Name and location of court that entered the judgment of conviction you are challenging:  
Delaware County Court of Common Pleas
  - Criminal docket or case number (if you know): CP-23-CR-0006201-2016
- Date of judgment of conviction (if you know): 10/25/17
  - Date of sentencing: 10/25/17
- Length of sentence: 18 Months Probation
- In this case, were you convicted on more than one count or of more than one crime? ☐ Yes ☒ No
- Identify all crimes of which you were convicted and sentenced in this case: Indecent assault

6. (a) What was your plea? (Check one)

☐ (1) Not Guilty☐ (3) Nolo contendere (no contest)☒ (2) Guilty☐ (4) Insanity plea(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

☐ Jury☐ Judge onlyN/A

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes☒ No

8. Did you appeal from the judgment of conviction?

☐ Yes☒ No

9. If you did appeal, answer the following:

(a) Name of court: \_\_\_\_\_

(b) Docket or case number (if you know): N/A

(c) Result: \_\_\_\_\_

(d) Date of result (if you know): \_\_\_\_\_

(e) Citation to the case (if you know): \_\_\_\_\_

(f) Grounds raised: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(g) Did you seek further review by a higher state court?

☐ Yes☒ No

If yes, answer the following:

- (1) Name of court: \_\_\_\_\_
- (2) Docket or case number (if you know): \_\_\_\_\_
- (3) Result: N/A
- (4) Date of result (if you know): \_\_\_\_\_
- (5) Citation to the case (if you know): \_\_\_\_\_
- (6) Grounds raised: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes ☒ No

If yes, answer the following:

- (1) Docket or case number (if you know): N/A
- (2) Result: \_\_\_\_\_
- (3) Date of result (if you know): \_\_\_\_\_
- (4) Citation to the case (if you know): \_\_\_\_\_

(i) Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

☒ Yes ☐ No

10. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: Delaware County Court of Common Pleas
- (2) Docket or case number (if you know): CP-23-CR-0006201-2016
- (3) Date of filing (if you know): 10/1/18
- (4) Nature of the proceeding: Post Conviction Relief Act
- (5) Grounds raised: ineffective assistance of counsel
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes

☒ No

(7) Result: N/A

(8) Date of result (if you know): Petition Dismissed on 1/7/19 w/out hearing

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes

☐ No

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): N/A

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion:

(1) First petition: ☒ Yes ☐ No  
 (2) Second petition: ☐ Yes ☐ No  
 (3) Third petition: ☐ Yes ☐ No

Superior Court appeal Pending  
at  
192 FDA 2019

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

\_\_\_\_\_  
 \_\_\_\_\_

11. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**CAUTION:** To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

**GROUND ONE:**

ineffective assistance of counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See Attached counsel petition

- Failure to mount a defense, failure to consult with or call favorable witnesses, Failure to prepare a defense, inadequate advice about plea offer

(b) If you did not exhaust your state remedies on Ground One, explain why: \_\_\_\_\_

Exhaustion currently pending at 192 EDA 2019

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☐ No

No Direct Appeal

(2) If you did not raise this issue in your direct appeal, explain why? \_\_\_\_\_

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

PCRA Petition

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Delaware County Court of Common Pleas

Docket or case number (if you know): \_\_\_\_\_

CP-23-ER-0006201-2016

Date of the court's decision: \_\_\_\_\_

11/7/19

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

See Attached

(3) Did you receive a hearing on your motion or petition?

☐ Yes

☒ No

(4) Did you appeal from the denial of your motion or petition?

☒ Yes

☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☒ Yes

☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Del. Cnty. Court of CP

Docket or case number (if you know): \_\_\_\_\_

192 EDA 2019

Date of the court's decision: \_\_\_\_\_

Still Pending

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

Still Pending

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: \_\_\_\_\_

N/A

**GROUND TWO:** \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

N/A

(b) If you did not exhaust your state remedies on Ground Two, explain why: \_\_\_\_\_

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**(d) Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

\_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

*n/A*



- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two: \_\_\_\_\_

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**GROUND THREE:** \_\_\_\_\_

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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- (b) If you did not exhaust your state remedies on Ground Three, explain why: \_\_\_\_\_

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**(c) Direct Appeal of Ground Three:**

- (1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes

☐ No

- (2) If you did not raise this issue in your direct appeal, explain why? \_\_\_\_\_

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**(d) Post-Conviction Proceedings:**

- (1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes

☐ No

- (2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

2/4

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: \_\_\_\_\_

**GROUND FOUR:** \_\_\_\_\_

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**(c) Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**(d) Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

\_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

\_\_\_\_\_

(3) Did you receive a hearing on your motion or petition?

☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue: \_\_\_\_\_

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: \_\_\_\_\_

12. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

☐ Yes ☒ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: currently in progress

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

no

13. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition?

☐ Yes

☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

14. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging?

☒ Yes

☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised:

Superior Court 192 EDA 2019  
\_\_\_\_\_  
\_\_\_\_\_

15. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Erik Benari, ESO

(b) At arraignment and plea: Erik Benari, ESO

\_\_\_\_\_

- (c) At trial: n/a
- (d) At sentencing: Erick Benari, FSA
- (e) On appeal: no Appeal
- (f) In any post-conviction proceeding: Todd Mosser, FSA (undersigned)
- (g) On appeal from any ruling against you in a post-conviction proceeding: Todd Mosser, FSA (undersigned)

16. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

☐ Yes

☒ No

- (a) If so, give the name and location of the court that imposed the other sentence you will serve in the future: \_\_\_\_\_

- (b) Give the date the other sentence was imposed: \_\_\_\_\_

- (c) Give the length of the other sentence: \_\_\_\_\_

- (d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future?

☐ Yes

☐ No

17. **TIMELINESS OF PETITION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition\*

Petition filed while PCA was pending  
This is a timely filed § 2254

\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of -
  - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

Revoke the judgment  
of sentence and order a new  
trial

or any other relief to which petitioner may be entitled.

T. M. Messer, Esq.  
Signature of Attorney (if any)

PAE AO 241  
(Rev. 07/10)

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I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this  
Petition for Writ of Habeas Corpus was placed in the prison mailing system on 6/26/19.  
(month, date, year)

Executed (signed) on 6/26/19 (date).

Todd A. Mosser  
Signature of Petitioner

If the person signing is not the petitioner, state the relationship to petitioner and explain why petitioner is not signing  
this petition. Todd Mosser is counsel for petitioner, who

is unavailable at this time to sign,  
above signed is signing and filing with  
petitioner's permission



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**CASE MANAGEMENT TRACK DESIGNATION FORM**

v.

CIVIL ACTION

NO.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

**SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:**

- (a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. (X)
- (b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ( )
- (c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ( )
- (d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ( )
- (e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ( )
- (f) Standard Management – Cases that do not fall into any one of the other tracks. ( )

3/27/19  
Date

Todd M. Mauser  
Attorney-at-law

John Berg  
Attorney for

215-567-1220

215-955-9100

todd@mauserlegal.com

Telephone

FAX Number

E-Mail Address

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**DESIGNATION FORM**

*(to be used by counsel or pro se plaintiff to indicate the category of the case for the purpose of assignment to the appropriate calendar)*

Address of Plaintiff: 211 North 13<sup>th</sup> Street, Suite 801, Philadelphia, PA 19107

Address of Defendant: 201 West Front Street, Media, PA 19063

Place of Accident, Incident or Transaction: \_\_\_\_\_

**RELATED CASE, IF ANY:**

Case Number: \_\_\_\_\_ Judge: \_\_\_\_\_ Date Terminated: \_\_\_\_\_

Civil cases are deemed related when *Yes* is answered to any of the following questions:

- |  |                              |  |
|--|------------------------------|--|
| 1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court?  | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court?            | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action of this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual?  | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |

I certify that, to my knowledge, the within case ☐ is / ☒ is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 3/27/19

[Signature]  
Attorney-at-Law / Pro Se Plaintiff

87534  
Attorney I.D. # (if applicable)

**CIVIL: (Place a ✓ in one category only)**

**A. Federal Question Cases:**

- ☐ 1. Indemnity Contract, Marine Contract, and All Other Contracts
- ☐ 2. FELA
- ☐ 3. Jones Act-Personal Injury
- ☐ 4. Antitrust
- ☐ 5. Patent
- ☐ 6. Labor-Management Relations
- ☐ 7. Civil Rights
- ☒ 8. Habeas Corpus
- ☐ 9. Securities Act(s) Cases
- ☐ 10. Social Security Review Cases
- ☐ 11. All other Federal Question Cases  
(Please specify): \_\_\_\_\_

**B. Diversity Jurisdiction Cases:**

- ☐ 1. Insurance Contract and Other Contracts
- ☐ 2. Airplane Personal Injury
- ☐ 3. Assault, Defamation
- ☐ 4. Marine Personal Injury
- ☐ 5. Motor Vehicle Personal Injury
- ☐ 6. Other Personal Injury (Please specify): \_\_\_\_\_
- ☐ 7. Products Liability
- ☐ 8. Products Liability - Asbestos
- ☐ 9. All other Diversity Cases  
(Please specify): \_\_\_\_\_

**ARBITRATION CERTIFICATION**

*(The effect of this certification is to remove the case from eligibility for arbitration.)*

Todd M. Masfer, counsel of record or pro se plaintiff, do hereby certify:

- ☐ Pursuant to Local Civil Rule 53.2, § 3(c) (2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs:
- ☒ Relief other than monetary damages is sought.

DATE: 3/27/19

[Signature]  
Attorney-at-Law / Pro Se Plaintiff

87534  
Attorney I.D. # (if applicable)

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY,  
PENNSYLVANIA  
CRIMINAL**

**COMMONWEALTH OF PENNSYLVANIA**

**CP-23-CR-6201-2016**

**V.**

**JOHN G. BERG**

**NOTICE OF INTENT TO DISMISS**

**AND NOW**, to wit, this 12<sup>th</sup> day of November, 2018 upon

consideration of Defendant's counseled PCRA Petition," and the Commonwealth's Answer thereto, and having conducted an independent review of the record, in the above matters, the Court, having concluded that there are no genuine issues concerning any material fact and that Petitioner is not entitled to post-conviction relief, and no purpose would be served by any further proceedings, hereby **notices the parties of its intent to dismiss** the PCRA Petition, filed on October 1, 2018 in the above-captioned matter without a hearing and sets forth the following:

- 1) On October 25, 2017, Defendant entered a negotiated guilty plea in the above captioned matter; and immediately thereafter, this Court sentenced the Defendant, consistent with the terms of the negotiated plea.
- 2) Section 9543 of the PCRA provides in part:  
"To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence all of the following:

\* \* \*

(2) That the conviction or sentence resulted from one or more of the following:

(i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

(iii) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

(iv) The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

\* \* \*

(vi) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.

(vii) The imposition of a sentence greater than the lawful maximum.

(viii) A proceeding in a tribunal without jurisdiction.

3) Section 9545 of the PCRA "Jurisdiction and Proceedings," provides in pertinent part:

b) Time for filing petition.--

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the

Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph.

(1) Shall be filed within 60 days of the date the claim could have been presented.


(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.

(4) For purposes of this subchapter, "government officials" shall not include defense counsel, whether appointed or retained.

- 4) The time limits set forth in Section 9545 of the PCRA implicate the jurisdiction of the court. Commonwealth v. Marshall, 947 A.2d 714 (Pa. 2008).
- 5) This frivolous Petition is timely.
- 6) "The right to an evidentiary hearing on a post-conviction petition is not absolute. A PCRA court may decline to hold a hearing if the petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence." Commonwealth v. Payne, 794 A.2d 902, 906 (Pa. Super. 2002). "The controlling factor in determining whether a petition may be dismissed without a hearing is the status of the substantive assertions in the petition." Id. quoting Commonwealth v. Weddington, 514 Pa. 46, 50, 522 A.2d 1050, 1052 (1987).

Petitioner may respond to this Notice of Intent to Dismiss Without Hearing within twenty (20) days of the date of this notice. Should Petitioner fail to respond to this notice within the aforementioned time, an order dismissing Petitioner's Motion for Post Conviction Collateral Relief shall be entered.

BY THE COURT:

  
George A. Pagano, J.

cc: A. Sheldon Kovach, Esquire  
Todd M. Mosser, Esquire

FILED  
JUN 14 PM 10:15  
CLERK OF  
JUDICIAL SUPPORT  
DELAWARE CO. PA.

**IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

**COMMONWEALTH OF PENNSYLVANIA** : **CP-23-CR-6201-2016**

**vs.**

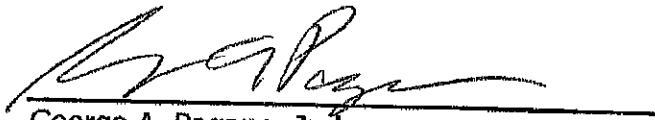
**JOHN G. BERG**

**ORDER**

**AND NOW**, to wit, this 7<sup>th</sup> **day of January, AD, 2019**, upon consideration of Defendant's Motion for Post Conviction Collateral Relief, and the Commonwealth's Response thereto, it is hereby ORDERED and DECREED that said Motion is DISMISSED.

Defendant has the right to appeal the decision of the Court. Such appeal must be in writing and be filed with the Office of Judicial Support of Delaware County within thirty (30) days after the entry of this Order.

BY THE COURT:

  
George A. Pagano, Judge

cc: A. Sheldon Kovach, Esquire  
Todd M. Moser, Esquire



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

John G. Berg  
Petitioner  
VS.

No. \_\_\_\_\_

Delaware County Probation Department  
Respondent

COUNSELED PETITION FOR WRIT OF HABEAS CORPUS  
BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. §2254

THE HONORABLE JUDGES OF SAID COURT:

**I. BACKGROUND**

1. At CP-23-CR-0006201-2016, Berg entered a negotiated guilty plea to one count of indecent assault (without consent of other) on October 25, 2017.
2. Berg was sentenced to eighteen months' sex offender's probation, and 15 years on the Sex Offenders' list, a lifetime sentence for a seventy-seven year old man.
3. Berg is currently serving that term of probation. Said term expires on April 24, 2019.

**II. FACTS**

4. In the affidavit of probable cause, the alleged victim, Rose Sabatino claimed that on June 8, 2016, at around 8:30 am, she appeared at Berg's home to interview for a housekeeping job.

5. According to Sabatino, Berg opened her vehicle door and directed her to his garage. Berg then supposedly put his hand on her shoulder and directed her into a mudroom.
6. Sabatino claims that once they were inside the mudroom, Berg closed the mud room door, then placed both his hands on the victim's shoulders and turned her towards him. She claimed that Berg pulled her body towards his and began to fondle her breasts over her shirt. She further claimed that Berg also fondled the victim's genital area over her pants. She also claimed that Berg took her right hand and forced it onto the outside of his genital area.
7. At the preliminary hearing in this matter, Sabatino claimed that Berg used "force," "pulled me close to him tight;" he "held me against him tight;" "very tight." *See*, N.T. 9/29/16 at 11-12.
8. Sabatino specifically claimed that she engaged in a physical struggle with Berg and that she could not escape from his grasp. She testified that the encounter only ceased when Berg let her go after she promised him she would return later in the day. *See*, N.T. 9/29/16 at 16.
9. Sabatino claimed the event could have lasted longer than five to ten minutes. *See*, N.T. 9/29/16 at 23.

10. She claimed that the more she pushed Berg, the “tighter he pulled.” *See*, N.T. 9/29/16 at 24.
11. At the conclusion of the preliminary hearing, Berg was held over on the charges of indecent assault (without consent), indecent assault (forcible compulsion), unlawful restraint, and false imprisonment.
12. Berg hired Arik Benari, Esquire (“prior counsel”), to represent him at trial.
13. Prior counsel did not adequately prepare for trial, despite Berg’s repeated requests to conduct the meaningful preparations and vitally important measures hereafter discussed.
14. On the day jury selection was set to begin, it had become apparent to Berg that his lawyer was woefully unprepared.
15. Considering the lack of sufficient and proper preparation, Berg was required and indeed induced to plead guilty. Berg was susceptible to such inducement because it was obvious that his lawyer was not properly and adequately prepared for trial.
16. Berg avers herein that he is entitled to relief as a result of ineffective assistance of prior counsel which deprived him of his federal Constitutional rights under the Sixth Amendment.

### **III. BERG RECIEVED INEFFECTIVE ASSISTANCE OF COUNSEL**

17. Prior counsel's advice to plead guilty was outside the range of competence demanded of criminal attorneys because he forfeited a viable, and likely successful defense and abandoned an investigation into that defense. This induced Berg to plead guilty.
18. As a threshold matter, Sabatino's claim is utterly untruthful and motivated by nefarious concerns.
19. The truth is that Sabatino had a financial motive to lodge her allegations against Berg.
20. In particular, Ms. Sabatino's "fiancé," Ronald Baroni, subsequently called Mr. Berg threatened to kill him, falsely accused him of "raping" his "wife," namely Plaintiff Sabatino, and demanded that he do something about it, i.e., pay money as extortion. When Mr. Berg refused, Sabatino continued with her criminal complaint against Berg, falsely concocting inflammatory allegations against him. She also filed a civil suit against him.
21. Moreover, Berg's physical limitations make it impossible for him to have committed the actions that Sabatino alleged.
22. In light of these physical limitations, Mr. Berg posted an advertisement on care.com in December of 2015 seeking to hire a housekeeper.

Curiously, Plaintiff Sabatino's adult daughter, Nichole Sabatino, interviewed for the same housekeeper position at Mr. Berg's residence in December of 2015. Sabatino now admits in her Answer to Mr. Berg's New Matter and Counterclaims that she also interviewed for the same position in December of 2015 and was inside the Berg residence at that time also.

23. Therefore, contrary to the allegations in the Complaint, and contrary to her criminal allegations, Sabatino knew her way to the Berg residence long before the alleged June 8, 2016 incident, and she knew her way around the inside of it. However, neither Ms. Sabatino nor her daughter was offered the job. Significantly, neither claims that any inappropriate conduct occurred during their December interviews with Mr. Berg inside the Berg home.

24. Plaintiff Sabatino was determined to get back inside the home.

25. In May of 2016, after both Ms. Sabatino and her daughter were inside Mr. Berg's residence without incident, Ms. Sabatino contacted Mr. Berg on multiple occasions in an attempt to set up another interview at his residence. Mr. Berg responded that he did not remember previously interviewing her, but agreed to conduct an interview at his residence on June 8, 2016.

26. The interview was scheduled for between 8:00 a.m. and 8:30 a.m., although Mr. Berg requested that Ms. Sabatino arrive on the earlier side of that timeframe because he had a meeting at 9:00 a.m. He had no idea that this interview request was all part of Plaintiff Sabatino's scheme to troll for a potential shake down.
27. Sabatino now admits that the night before the interview she drove by the Berg residence with her adult son. Despite admitting that she had already been to and inside the Berg home previously, Ms. Sabatino alleged that she reconnoitered the Berg home so that she would not get lost or be late for the interview.
28. As aforementioned, Berg was physically incapable of committing the acts that Sabatino alleged.
29. Berg suffered an aortic dissection on November 31, 2009 and was subjected to a six-hour, open heart operation on the morning of December 1, 2009.
30. An aortic dissection is a serious condition in which the inner layer of the aorta, the large blood vessel branching off near the heart, tears. Blood surges through the tear causing inner and middle layers of the aorta to separate (dissect). If the blood-filled channel ruptures through the outside of the aortic wall, aortic dissection is often fatal.

31. Aortic dissection is relatively uncommon. The condition occurs most frequently in men in the 60s and 70s. Mr. Berg's disease manifested when he was 68.
32. Berg's operation did not treat a continuing dissection in his right Hemiarch for an acute type A aortic dissection because of the limitations imposed by the endurance of the human body. He suffers from: a residual dissection in the arch extending into right carotid, left subclavian, and bilateral iliac arteries.
33. Mr. Berg has and will continue to suffer from an abnormality in his right vertebral artery and a suboptimal MRA (which was observed as recently during testing in March 2018).
34. His treatment consisted of open-heart surgery to replace an aortic valve in his heart and to replace his right descending aortic artery with a Teflon prosthesis. Because his right leg was substantially deprived of blood from the offset of his event around 9 pm on the evening of November 30, 2009 until the open-heart surgery was completed around 5 a.m. on December 1, 2009 he developed and continues to suffer from malperfusion of his right leg with loss of sensory and motor function.
35. Dr. Nimesh Desai, MD., PhD., is the cardiovascular surgeon that operated on Berg on December 1, 2009.

36. He is prepared to explain that there are now and were at the time of the alleged assault significant restrictions on Berg's ability to have physically exerted himself, and that Berg would be correct to have had concerns about a fatal medical incident were he to have exerted himself as Sabatino's testimony at the preliminary hearing necessarily indicated – even assuming Petitioner would have been physically able.
37. Dr. Kelly Anne Spratt, Berg's cardiologist, was and is able to testify that: she has examined Berg frequently since he became her patient in February 2010, shortly after his hospital discharge, until the present time. During this 8-1/2-year period she has examined him once or twice every year.
38. At various times during her treatment of Berg she has subjected him to stress tests; CT angiography of his chest, abdomen and pelvis, echocardiograms, electrocardiograms, and CT scans.
39. According to Dr. Spratt, Berg fatigues easily and even requires her help to mount the single step onto the examination table.
40. Dr. Spratt also states that Berg is under instruction to avoid stressful situations because of his hypertension and issues with the remaining dissection in the arch extending into his right carotid artery, and lifting restrictions for the same reasons.



41. Dr. Spratt is prepared to opine that Berg is not and has not been capable of holding a mature, healthy, struggling adult for any length of time and certainly not for five minutes. His state of health and lack of balance prohibit such activities.
42. Dr. Lauren Cordes Flynn, Berg's treating neurologist since 2016 is prepared to testify to substantially the same substance as Dr. Kelly. Moreover, she could have, and currently can, testify that Berg has limited balance capability and would not have been able to maintain his balance while assaulting Ms. Sabatino as she described at the preliminary hearing.
43. Further still, Ms. Kellie Brown, Berg's housekeeper from before and after Sabatino's allegations, sees Berg on a weekly basis. She too was, and is, able to testify that Berg's lack of balance and severe physical limitations affect his ability to exert himself physically. She can recall several instances in which Berg was unable to lift various items and dropped things he was trying to carry.
44. Even further still, Mrs. Maureen Berg wanted to testify at Berg's trial. In fact, prior counsel interviewed Mrs. Berg, Berg's wife, whose testimony would have been that she was upstairs in the laundry room about thirteen feet away from Berg and Sabatino in the mudroom on the first floor during

the entire interview (about ninety seconds) and heard nothing. Prior counsel did not prepare Mrs. Berg to testify.

45. Prior counsel was ineffective because he inadequately prepared and thus induced Berg to plead guilty because Berg was unable to present his crucially important medical defense.

46. “Where a claim is made of counsel's ineffectiveness for failing to call witnesses, it is the [petitioner's] burden to show that the witness existed and was available; counsel was aware of, or had a duty to know of the witness; the witness was willing and able to appear; and the proposed testimony was necessary in order to avoid prejudice to the [petitioner]. The mere failure to obtain an expert rebuttal witness is not ineffectiveness. [Petitioner] must demonstrate that an expert witness was available who would have offered testimony designed to advance a [petitioner's] cause....” *See, Commonwealth v. Treiber*, 121 A.3d 435, 454 (Pa. 2015).

47. Berg consistently asked prior counsel to investigate his defense that he was physically incapable of assaulting Ms. Sabatino.

48. The strength of the Commonwealth's case rested entirely on the credibility of Sabatino's oral statement to the investigating officer within hours of the alleged event because it was noted by that officer that she had no

disheveled clothing, no bruises, no torn clothing or any evidence of a physical struggle, as well as her preliminary hearing testimony where she described in great detail the efforts Berg went to assault her.

49. Dr. Desai; Dr. Flynn; Dr. Spratt; Ms. Brown; and Mrs. Berg's proposed testimony<sup>1</sup> would have definitively rebutted the notion that Berg is physically capable of assaulting anyone in the manner described in Sabatino's testimony at the preliminary hearing and would thus have caused a jury to acquit Berg.

50. In a case where virtually the only issue is the credibility of the Commonwealth's witness versus that of the defendant, failure to explore all alternatives available to assure that the jury heard the testimony of a witness who might be capable of casting a shadow upon the Commonwealth's witness' truthfulness is ineffective assistance of counsel. *See, Commonwealth v. Twiggs*, 331 A.2d 440, 443 (Pa. 1975).

51. Thus, prior counsel had no reasonable basis for failing to contact Dr. Desai; Dr. Flynn; Dr. Spratt; Ms. Brown; or Mrs. Berg and for failing to call them as witnesses. *Accord, Commonwealth v. McCaskill*, 468 A.2d

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<sup>1</sup> All of these witnesses could have and were willing to testify at trial. They are willing and able to testify at an evidentiary hearing in this case.

472 (Pa. Super. 1983) (counsel lacked reasonable basis for failing to call witness whose testimony would have aided the defense).

52. Prejudice is hereby pled. Had prior counsel secured these witnesses for trial, Berg would not have been induced to plead guilty. *Accord*, *Commonwealth v. Williams*, 141 A.3d 440 (Pa. 2016) (affirming grant of PCRA relief based on claim that counsel was ineffective for failing to call or consult with an appropriate expert witness).

53. Given the foregoing, counsel's advice to Berg to plead guilty was unreasonable. *Accord*, *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed.2d 398 (2012)([i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it). Prior counsel made no effort to explain to Berg what his chances at trial would be if Berg's desired defenses were put forth.

54. Berg need not prove that he would have been successful at trial, but rather, must merely show that there is a "reasonable probability" that a different outcome at the plea-bargaining stage would have occurred. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

55. The "reasonable probability" test is not a stringent one. *See Nix v. Whiteside*, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986)

(reasonable probability standard less demanding than preponderance standard).

56. There is a reasonable probability that the result of the plea-bargaining negotiations would have been different had trial counsel actually prepared for trial, as he was supposed to do. Rather than doing so, Berg was left with the reality that he would go to trial with an unprepared lawyer. Had counsel adequately prepared, Berg would have insisted on a trial in order to prove his innocence.

57. Given the foregoing, Berg is entitled to relief in the form of being permitted to withdraw his guilty plea and proceeding to trial.

#### **IV. STAY OF HABEAS PROCEEDINGS**

58. Berg's PCRA petition was summarily dismissed by the court of Common Pleas without any analysis whatsoever.

59. Berg has appealed that decision.

60. The appeal is ongoing.

61. Since Berg is still in "custody" at this point, the instant Petition is timely and properly filed.

62. Given the pendency of Berg's state court litigation which will undoubtedly resolve after his probation expires, Berg requests that this Court STAY the instant proceedings until that litigation is resolved.

63. After Berg's state court litigation is resolved, he will move this Court to lift the stay and proceed with litigation related to the instant petition.

## **V. CONCLUSION**

64. Prior counsel was hired to develop a defense and to proceed to trial on Berg's behalf. In fact, the morning of the guilty plea, Berg still believed that he was going to trial.

65. Berg repeatedly asked prior counsel to investigate the defense he wished to pursue.

66. Prior counsel ignored Berg because he wanted him to plead guilty rather than go to trial.<sup>2</sup>

67. A defendant is denied his Sixth Amendment right to counsel when he is faced with the choice of pleading guilty or going to trial with a lawyer who does not want to go to trial. *Accord, Commonwealth v. Lasko*, 14 A.3d 168 (Pa. Super. 2011).

68. Here, Berg was faced with this exact choice.

69. Given the foregoing, Berg was denied his Sixth Amendment right to effective assistance of counsel.

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<sup>2</sup> Undersigned counsel has spoken with Mr. Benari. Mr. Benari advised that he did not pursue Berg's desired defense because his opinion is that force was not part of the crimes alleged.

**WHEREFORE**, Berg respectfully requests that this Court STAY the instant petition until the state court litigation is resolved, and once resumed, VACATE his judgment of sentence and order a new trial; or, in the alternative, an evidentiary hearing.

**RESPECTFULLY SUBMITTED:**



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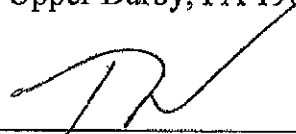
3/20/19

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the person and in the manner indicated below:

SERVICE VIA FIRST CLASS MAIL

Delaware County Probation Department  
6909 Ludlow St # 6, Upper Darby, PA 19082

  
\_\_\_\_\_

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